owing by *B* might be still another ground which would afford *A* a defense; that is, if both *A* and *C* suppose that *B* has done an act obligating himself, when in fact he has not, *A* should, it seems, have a defense.[22]

There are, no doubt, many other situations which may afford *A* and *B* defenses upon their respective undertakings.[23] But, in view of the foregoing analysis of various typical situations, it would seem clear that a promise which may give *A*, the promisor, the position of a surety is governed by the same rules as any other promise. The mere fact that *B*, the supposed principal, is himself under no obligation is no defense to *A* in a suit upon his promise, and the cases which might give rise to that inference can practically all be explained to on the normal principles of contract law.

EFFECT OF SUBSEQUENT LEGISLATION UPON SPECIFIC PERFORMANCE OF A CONTRACT FOR THE SALE OF REALTY.—Injury to, or destruction of, the subject matter of a sale during the pendency of an executory contract raises the question upon whom the burden of loss shall fall. It is elementary that in ascertaining rights under a contract the courts will look at the intention of the parties, and, unless contravened by some rule of law, such intention will control. But in the absence of any express intention, the courts will resort to presumptions of law. Thus, in the case of a contract for the sale of personalty, various rules of thumb have been developed to aid the court in determining the respective rights of the parties.[1] Similarly, in the case of an agreement to sell realty, recourse must be had to rules of law if there is no express intent as to who shall bear the loss.

It is usually stated that the risk of loss in an executory contract for the sale of land falls upon the vendee because, in equity, he is the

---

Hager *v.* Mounts (Ind. 1832) 3 Blackf. 57; Griffith *v.* Sitgreaves (1879) 90 Pa. 187; Patterson *v.* Gibson (1888) 81 Ga. 802, 6 S. E. 840; Graham *v.* Marks (1895) 98 Ga. 67, 25 S. E. 931; Baker *v.* Steele (1915) 61 Pa. Super. Ct. 483.

[22]See Lakeman *v.* Mountstephen (1872) L. R. 7 Q. B. 196, 202; but *cf.*, Jones *v.* Thayer, *supra*, footnote 16.

[23]For instance, if contracts upon certain subjects are void at common law or under statute, it has been held that, since the subject matter of *A's* and *B's* contracts is the same, the obligation of neither may be enforced. Thompson *v.* Lockwood (N. Y. 1818) 15 Johns. 255; United States *v.* Tingey (1831) 30 U. S. 115; see Hawes *v.* Marchant (U. S. 1852) 1 Curtis Cir. Ct. Rep. 136.

[1]For instance, if the contract is made in reference to unspecified goods and there has been no appropriation, title will be presumed not to have passed, and, in case the goods are destroyed, the loss falls upon the vendor. Anderson *v.* Morice (1875) L. R. 10 C. P. 609. Again, where the courts find that the legal title is retained by the seller only for the purpose of security, as in a conditional sale, American Soda Fountain Co. *v.* Vaughn (1903) 69 N. J. L. 582, 55 Atl. 54, or in a shipment, in pursuance of an order, under a bill of lading, Browne *v.* Hare (1858) 3 H. & N. *484; Williston, Sales, § 305, the burden of loss will be thrown upon the vendee for he is the beneficial owner.

owner.[2] And his status is said to be like that of a *cestui que trust* or mortgagor. Having equitable title, all ordinary results follow. For example, his interest constitutes assets so that he can assign it or charge it;[3] it descends to his heirs,[4] is devisable,[5] and, in those jurisdictions which permit a wife to have dower in the equitable estate of her husband, the widow of the vendee gets dower.[6] The vendor is bound in equity to convey, and a purchaser with notice from him takes subject to the grantor's obligations.[7] The property is, furthermore, not subject to attachment by the seller's creditors.[8] Any loss or deterioration in the subject matter, such as the burning of the house without fault of either party, will, consequently, be borne by the vendee,[9] as will any sudden increase in the value of the estate inure to his benefit.[10]

It is not, however, always true that, upon entering into the contract, the vendee becomes at once the beneficial owner of the property.[11] The only reason why a vendee can ever be said to be the equitable owner is because equity will decree specific performance of the contract. It is, therefore, necessary to see first whether the agreement is specifically enforcible. And, although broadly speaking inadequacy of legal remedy gives rise to equity jurisdiction, still, where it does exist (as it always does by conclusive presumption in a case where realty is the subject of the contract) the court may, nevertheless, deny its extraordinary relief. It follows that, if the parties stipulate that a certain condition be fulfilled before performance, equitable title will not pass until such agreement becomes absolute.[12] Likewise, if there is a lack of mutuality,[13] or if the plaintiff has been guilty of fraud,[14] or if there is

---

[2]See William A. Keener, The Burden of Loss as an Incident of the Right to the Specific Performance of a Contract, 1 Columbia Law Rev. 1; Harlan F. Stone, Equitable Conversion by Contract, 13 Columbia Law Rev. 369, 385; Samuel Williston, The Risk of Loss After an Executory Contract of Sale in the Common Law, 9 Harvard Law Rev. 106, 111; see also note in 12 Columbia Law Rev. 257. The doctrine has not been logically extended so as to constitute the vendor a trustee of the insurance money received upon the destruction of the premises. Rayner *v.* Preston (1881) 18 Ch. D. 1; *contra,* Reed *v.* Lukens (1863) 44 Pa. 200. The vendor's right to rents and profits until the time of performance has been explained upon the theory that the extent of the vendee's equitable rights is measured by the purchase price. See 1 Columbia Law Rev. 1.

[3]See Shaw *v.* Foster (1872) L. R. 5 H. L. 321, 338.

[4]Langford *v.* Pitt (1731) 2 P. Wm. 629.

[5]Townsend *v.* Champernowne (1821) 9 Price 130; Buck *v.* Buck (N. Y. 1844) 11 Paige 170.

[6]Bailey and Wife *v.* Duncan's Representatives (1827) 20 Ky. 256.

[7]Bailey *v.* Coffin (Me. 1916) 99 Atl. 447.

[8]Scott-Baldwin Co. *v.* McAdams (1914) 43 Okla. 161, 141 Pac. 770.

[9]Paine *v.* Meller (1801) 6 Ves. Jr. 349; Sewell *v.* Underhill (1910) 197 N. Y. 168, 90 N. E. 430; *contra,* Wilson *v.* Clark (1880) 60 N. H. 352; Gould *v.* Murch (1879) 70 Me. 288.

[10]Rausch *v.* Hanson (1910) 26 S. D. 273, 128 N. W. 611.

[11]See Harford *v.* Purrier (1816) 1 Madd. 532.

[12]Gilbert & Ives *v.* Port (1876) 28 Oh. St. 276; Northern Texas Realty & Construction Co. *v.* Lary (Tex. Civ. App. 1911) 136 S. W. 843; Counter *v.* Macpherson (1845) 5 Moore P. C. 83; see Pomeroy, Spec. Perf. (2nd ed.) § 319.

[13]Wakeham *v.* Barker (1889) 82 Cal. 46, 22 Pac. 1131.

[14]Hargis *v.* Smith (Mo. 1915) 178 S. W. 72.

present any element which will prevent the court from acting, it cannot be said that the vendee, in such a case, has become the owner of the estate in equity.[15] The fact that the contract is not specifically enforcible and that the vendee is not, therefore, equitable owner, will protect the vendee in a suit at law for breach of the contract when the reason for equity's refusal to grant relief constitutes a ground for rescission and, therefore, a good defense at law. But where specific performance is denied because of hardship, there is no ground for rescission, and the fact that the chancery court considered it inequitable to enforce the agreement does not constitute a legal defense.[16] Hence, in such a case, the vendee although not the equitable owner will, through an action at law, be compelled ultimately to bear the loss,—though, of course, this loss in money damages need not necessarily be identical with that which he would have suffered had he been compelled to take the property in specie.

With this in mind, the recent case of *Anderson* v. *Steinway & Sons* (N. Y. Ct. of App. 1917) 117 N. E. 575 presents a particularly interesting problem. A contract for the sale of a certain parcel of city property was entered into on the 13th of July, 1916, and was to be performed on the 1st day of August following. It expressly provided that the estate was to be subject only to a certain restrictive covenant against nuisances. The defendant's sole purpose in purchasing this property was to erect a factory on the premises, a fact of which the plaintiff was aware. On the 25th of July, 1916, the City of New York passed a zoning law dividing the city into residence and business districts, with the result that the property in question was restricted to residential use. The purchaser refused to accept a tender of the deed on the day fixed for the conveyance, and the vendor thereupon filed his bill for specific performance. The court, two judges dissenting, refused to grant relief on the ground that it would be inequitable to enforce the contract.[17]

Under the foregoing analysis, the dismissal of the bill in the instant case affords the defendant but little solace, since he is left subject to an action at law. Aside from this, however, the application of the doctrine of hardship ought not, it is submitted, on theory, to have been the ground for the denial of relief. For although a court of equity is a court of discretion, still it cannot arbitrarily or capriciously exercise its powers. Its discretion is judicial, being based on well settled rules, and a plaintiff who brings himself within them can demand relief as a matter of right.[18] That a court will not, as a rule, enforce a contract if it works a hardship on the defendant or proves so unfair that it would be inequitable to have it carried out, is undoubtedly true.[19] But, according to the weight of authority and the better reasoning, such inequality should be judged as of the date of

[15]Blew *v.* McClelland (1860) 29 Mo. 304, where the loss was held to fall on the vendor because non-compliance with the Statute of Frauds rendered the contract unenforcible in equity.

[16]Ducas Co. *v.* Bayer Co. (1916) 163 N. Y. Supp. 32; Berg *v.* Erickson (C. C. A. 1916) 234 Fed. 817.

[17]See opinion of the lower court in 178 App. Div. 507, 165 N. Y. Supp. 608.

[18]Friend *v.* Smith (1916) 191 Mich. 99, 157 N. W. 347; Matthes *v.* Wier (1912) 10 Del. Ch. 63, 84 Atl. 878.

[19]Willard *v.* Tayloe (1869) 75 U. S. 557; Brewer *v.* Herbert (1869) 30 Md. 301; see Cumberledge *v.* Brooks (1908) 235 Ill. 249, 85 N. E. 197.

the execution of the contract, and, if the agreement in its inception possesses all the elements of fairness both in its terms and in its surrounding circumstances, this requisite is forever satisfied and subsequent events or change of position will not defeat the plaintiff's rights.[20] In so far then as hardship was concerned, it would seem that the contract in the principal case ought to have been specifically enforced even though the change in the law prevented the defendant from putting the property to the very use for which it was intended.[21]

The court might very well, however, have denied specific performance on the ground that the title which the vendor tendered on the day fixed for conveyance was an unmarketable one. For it seems clear that the restriction which was here imposed on the estate would, if found in the chain of title, constitute an incumbrance on the property.[22] Assuming it be such, as indeed it was within the meaning of this particular contract,[23] the passage of the statute was a contingency which affected, not the subject matter itself, but the title to it, and the vendee not having accepted such defective title would not be made specifically to perform. This would really protect the vendee because it would give him a good defense to an action at law on the contract.

It is perhaps true that no logical distinction can be made between contingencies which affect the subject matter and those which affect the title,[24] but, nevertheless, the line of demarcation, though an arbi-

---

[20]Revell *v.* Hussey (1813) 2 Ball. & B. 280; Prospect Park & C. I. R. R. *v.* Coney Island & B. R. R. (1894) 144 N. Y. 152, 39 N. E. 17; Texas Co. *v.* Central Fuel Oil Co. (C. C. A. 1912) 194 Fed. 1; Larson *v.* Smith (1916) 174 Iowa 619, 156 N. W. 813; see Fry, Spec. Perf. (5th ed.) §§ 389, 418; *contra,* Willard *v.* Tayloe, *supra,* footnote 19. This rule is, of course, subject to certain exceptions, *e. g.,* where the plaintiff's conduct in reference to the particular transaction has not been honorable and fair, Naughton *v.* Morford-Wood Co. (1914) 90 Oh. St. 61, 106 N. E. 659; where the enforcement will result in great harm to the defendant and slight benefit to the plaintiff, McDowell *v.* Biddison (1913) 120 Md. 118, 87 Atl. 752; where specific performance, if decreed, would be harsh and oppressive to innocent third parties, Owens *v.* McNally (1896) 113 Cal. 444, 45 Pac. 710; or where the decree will work a forfeiture of the defendant's estate. Ball *v.* Milliken (1910) 31 R. I. 36, 76 Atl. 789.

[21]In Adams *v.* Weare (1784) 1 Bro. C. C. 567, due to events subsequent to the inception of the contract, the vendee was prevented from using the property for the purpose which furnished the inducement for his entering into the agreement, yet specific performance was granted.

[22]See Washburn, Real Property (6th ed.) § 2385; Tiedeman, Real Property (3rd ed.) § 617; *cf.,* Foster *v.* Foster (1882) 62 N. H. 46. But where, subsequent to the passage of the building zone resolution, the parties contracted for the sale of land free from all incumbrances, such ordinance was held not to affect the title since the parties were regarded as having contracted in reference to existing law. Lincoln Trust Co. *v.* Williams Bldg. Corp. (N. Y. Sup. Ct. 1917) 57 N. Y. L. J. 1368.

[23]*Cf.,* Cavenaugh *v.* McLaughlin (1887) 38 Minn. 83, 35 N. W. 576; Wallach *v.* Riverside Bank (1912) 206 N. Y. 434, 100 N. E. 50; see cases, *infra,* footnote 26.

[24]This may be more clearly brought out by the following illustrations: suppose a party contracts to buy realty (1) to be used for the manufacture of fermented and malted liquors,—and thereafter a prohibition law is passed; (2) to be used for a piano factory,—and thereafter a tariff law is enacted which renders the business unprofitable. Perhaps these cases may be distinguished on the ground that, in the former, title has been encumbered, whereas, in the latter, the statute touches the transaction so

trary one, has been drawn. For while, under *Paine* v. *Meller*,[25] equity will decree specific performance despite the destruction of the subject matter by fire, yet it will not do so where, while the contract is still executory, condemnation proceedings have been begun in the exercise of the power of eminent domain.[26] Since the doctrine of *Paine* v. *Meller* finds but little justification either in law or in morals, the courts ought, wherever possible, to limit its application even though in so doing they lay themselves open to the charge of inconsistency.

The failure of the equity court in the instant case to base its decision on the reasoning herein suggested means, it is submitted, that, if the vendee is sued at law and the court really desires to protect him, it will either have to qualify its former opinion, or change its rule and recognize the equitable defense of hardship in such class of cases.

---

collaterally as only to affect the subject matter. But in cases where the land contracted for has been taken by the state in the exercise of eminent domain, and in cases where a life estate terminates before the date on which it is to be conveyed, is the subject matter or the title affected, or has there been a merger of title and subject matter so that both are affected?

[25] *Supra*, footnote 9.

[26] Johnston *v.* Callery (1896) 173 Pa. 129, 33 Atl. 1036; Kares *v.* Covell (1902) 180 Mass. 206, 62 N. E. 244; *cf.*, Mackey *v.* Bowles (1896) 98 Ga. 730, 25 S. E. 834, where the vendee did not have to bear the loss because the vendor had no title to convey; *contra*, Nixon *v.* Marr (C. C. A. 1911) 190 Fed. 913, which may, perhaps, be distinguished on the ground that the vendee was in possession of the premises at the time when condemnation proceedings were begun.